

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-3307

Appeal MA14-518

Ottawa Police Services Board

April 26, 2016

Summary: A request was filed with the police for records related to a specific complaint. The police denied access to the records, in their entirety, pursuant to the discretionary personal privacy exemption at section 38(b). In this order, the adjudicator upholds the police's decision to deny access to the records under section 38(b), in part, finding that an affected party consented to the disclosure of their own personal information under section 14(1)(a). The adjudicator orders the police to disclose the personal information of the consenting affected party to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of personal information), 14(1)(a), 14(2)(f), (h) and (i), 14(3)(b), 14(4)(c), 38(b) and 54(a).

Orders Considered: Orders P-998, PO-1723, PO-2033-I, MO-2237, MO-2830, and MO-3126.

OVERVIEW:

[1] The appellant filed a request with the Ottawa Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a police file, identified by number. The file relates to a complaint against the appellant that was initiated by an affected party (affected party A), regarding the appellant's husband, who is now deceased.

[2] Pursuant to section 21 of the *Act*, the police notified and sought the representations of affected party A who filed the complaint and therefore has an

interest in the disclosure of some of the responsive information. Affected party A did not consent to the disclosure of their information. Subsequently, the police issued a decision letter denying access to the requested records, in their entirety. Access was denied pursuant to the discretionary personal privacy exemption at section 38(b), read in conjunction with the factors set out in section 14(2)(f) (highly sensitive), 14(2)(h) (supplied in confidence), and 14(2)(i) (unfair damage to reputation), as well as the presumption against disclosure at section 14(3)(b) (investigation into a possible violation of law).

[3] The appellant appealed the police's decision to deny access to the requested records.

[4] As a mediated resolution could not be reached, the file was transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry. Representations were sought and received by the parties in accordance with this office's *Practice Direction 7*.

[5] In the order that follows, I find that section 38(b) applies to the majority of the information at issue and that the police's exercise of discretion to deny access to it was reasonable. However, I find that one of the individuals whose information is contained in the records (affected party B) has consented to its release. Accordingly, I have ordered the police to disclose to the appellant, portions of the information provided to them by affected party B.

RECORDS:

[6] The records at issue are:

- a video witness statement;
- a general occurrence report that details the police's investigation into the complaint and contains notes from interviews as well as a written synopsis of the video witness statement; and,
- the police notes of two officers.

PRELIMINARY MATTER:

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) of the *Act* and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 38(b) apply to the information at issue?

- C. Did the police exercise their discretion under section 38(b)? If so, should this office uphold their exercise of discretion?

DISCUSSION:

A. Do the records contain “personal information” as defined in section 2(1) of the *Act* and, if so, to whom does it relate?

[7] Under the *Act*, different exemptions may apply depending on whether a record contains or does not contain the personal information of the requester.¹ Accordingly, in order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains “personal information” and, if so to whom it relates. That term is defined in section 2(1) of the *Act*:

“personal information” means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except if they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

¹ Order M-352.

(h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[8] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.² To qualify as personal information, it must be reasonable to expect that an individual maybe identified if the information is disclosed.³

[9] Section 2(2.1) also relates to the definition of personal information:

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[10] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.⁴ Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.⁵

Representations

[11] The police submit that the records at issue contain information that falls within the scope of the definition of "personal information" in section 2(1) of the *Act*. They submit that it would be reasonable to expect that the individuals to whom this personal information relates would be identified if the information were to be disclosed. They explain that the personal information contained in the records belongs primarily to the appellant, affected party A, and the deceased individual but they submit that it also includes personal information about other identifiable individuals.

[12] The appellant does not specifically comment on whether the records contain "personal information" as that term is defined in section 2(1) of the *Act*. The appellant does, however, submit that with respect to the individuals whose information may appear in a professional capacity, the police "have potentially blurred their personal lives with the authority and responsibilities they hold in society."

Analysis and finding

[13] Having reviewed the records, I find that they contain the "personal information"

² Order 11.

³ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

⁴ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁵ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

of the appellant as that term is defined in section 2(1) of the *Act*. This personal information includes her name, together with other personal information about her (paragraph (h)), her age and marital status (paragraph (a)), her home address and telephone number (paragraph (d)), her driver's licence number (paragraph (c)), as well as the views or opinions of other individuals about her (paragraph (g)).

[14] Additionally, the records contain the personal information of other identifiable individuals, including that of the deceased, affected party A, and affected party B who was interviewed during the course of the investigation into the complaint. For all three of these individuals, the personal information in the records includes their ages (paragraph (a)), home addresses and telephone numbers (paragraph (d)), their driver's licence numbers (paragraph (c)), their personal opinions or views (paragraph (e)) and their names, together with other personal information about them (paragraph (h)).

[15] With respect to the deceased, the records contain information relating to his medical history (paragraph (b)). With respect to affected party B who spoke to the police during the course of the investigation, the records contain information about their employment history (paragraph (b)).

[16] In addition to this personal information, the records contain a small amount of information belonging to affected party A and affected party B that may be considered their professional information. However, on my review of this information and the context within which this information was provided, I am satisfied that it would also reveal something of a personal nature about these individuals, and therefore constitutes their personal information.⁶

[17] Accordingly, the records contain the personal information of the appellant, together with that of other identifiable individuals. As they also contain the appellant's own personal information, access is addressed under Part II of the *Act* and I must consider whether the discretionary exemption at section 38(b) applies.

B. Does the discretionary exemption at section 38(b) apply to the information at issue?

[18] Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.⁷

[19] Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold in section 38(b) is met. Although I will address

⁶ Order PO-1880.

⁷ See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 38(b).

the possible application of section 14(1)(a), the information at issue in this appeal does not fit within any of paragraphs (b) to (e) of section 14(1).

[20] The factors and presumptions in section 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f) that section reads:

A head shall refuse to disclose personal information to any person other than the individual to whom it relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

[21] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the personal information is presumed to amount to an unjustified invasion of personal privacy. This presumption can be overcome if any of paragraphs (a) to (c) of section 14(4) apply or if, under section 16, a compelling public interest in the disclosure of the personal information can be established. It does not appear that section 16 applies in the circumstances of this appeal.

[22] Section 14(2) lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy, and the information will be exempt unless the circumstances favour disclosure.⁸

[23] For records claimed to be exempt under section 38(b), this office will consider and weigh the factors, presumptions and exceptions in sections 14(2), (3) and (4) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.

Representations, analysis and findings

Section 14(1)(a) – consent

[24] Section 14(1)(a) reads:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

Upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access.

[25] The appellant submits that affected party B has consented to the release of their personal information and therefore, that the portions of the records relating to that individual should be disclosed. In support of this position, the appellant has attached to her representations a letter in which affected party B confirms that they consent to the disclosure of the information that they provided to the police during their investigation,

⁸ Order P-239.

to the appellant.

[26] Previous orders have established the requirements necessary for section 14(1)(a) to apply. In Order PO-2033-I, former Assistant Commissioner Tom Mitchinson considered section 21(1)(a) of the *Freedom of Information and Protection of Privacy Act*, the provincial equivalent of section 14(1)(a) and stated:

In order for consent to operate as an exception to the mandatory section 21(1) exemption, it must be in writing, and provided to the institution that has custody and control of the records containing the individual's personal information. The individual can provide this consent either directly to the institution or indirectly through this office on appeal.

[27] Similarly, in Order PO-1723, Adjudicator Laurel Cropley stated:

In my view, section 21(1)(a) requires that consent be provided under the Act, that is, the consenting party must provide a written consent to the disclosure of his or her personal information in the context of an access request. The affected persons' disclosure of their personal information to the appellant was done in the context of their dispute and does not, in my view, extend to disclosure under the Act.

[28] These orders suggest that the consent required under section 14(1)(a) is specific to the operation of the *Act*.

[29] Additionally, in Order P-998, Adjudicator Laurel Cropley addressed a situation where a number of affected parties consented to the disclosure of the contents of letters that they submitted to the Ministry of the Attorney General. Adjudicator Cropley noted that the records to which consent to disclosure was obtained also contained the personal information of individuals who did not provide their consent to disclosure. She went on to conclude that the consent of the affected parties under section 21(1)(a) could not apply to the portions of the letter that contain the personal information of the individuals who did not provide consent and went on to analyze whether that remaining information could be disclosed under sections 21(1), (3) and (4).

[30] I have considered the orders set out above and the approach taken to the exception that permits the disclosure of personal information if consent has been provided. In the circumstances of this appeal, I accept that affected party B has provided written consent to the disclosure of their personal information to the appellant. Additionally, from the content of this letter, it is clear that consent was provided in the context of the appellant's access to information request to the police and that consent is being provided to grant the appellant access to information that affected party B provided to the police during the course of their investigation.

[31] I acknowledge that affected party B's consent was not provided to the institution directly but that it was provided indirectly through this office on appeal. However, in keeping with Order PO-2033-I where former Assistant Commissioner Mitchinson

accepted that consent could be provided indirectly through this office on appeal, I accept that the consent provided to me on appeal, attached to the appellant's representations, is valid for the purposes of section 14(1)(a).

[32] I note that the information provided to the police by affected party B is not a signed statement but consists of portions of the occurrence report narrative in which the police have recorded information communicated to them verbally by affected party B. This information includes sensitive information about others, whose consent was not obtained. In keeping with Adjudicator Cropley's reasoning in Order P-998, affected party B's consent under section 14(1)(a) does not apply to the portions of information that contain the personal information of other identifiable individuals who did not provide consent. Those portions will remain part of my discussion on whether disclosure of the information remaining at issue would constitute an unjustified invasion of those individuals' personal privacy, below.

[33] I find that section 14(1)(a) applies to the portions of information contained in the occurrence report that contain affected party B's personal information as they have consented to its disclosure. I find that section 14(1)(a) also applies to the portions of the occurrence report that contain affected party B's personal information where it is intertwined with the personal information of the appellant. Accordingly, the exemption at section 14(1) does not apply to this information, it is no longer at issue, and I will order it disclosed to the appellant.

Section 14(3) - Presumptions against disclosure

[34] The only presumption that appears to be relevant in the circumstances of this appeal is that which is found at section 14(3)(b). Section 14(3)(b) states that disclosure of information that has been compiled and is identifiable as part of an investigation into a possible violation of law is presumed to constitute an unjustified invasion of personal privacy of the individual to whom the personal information relates.

[35] Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.⁹ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.¹⁰

[36] The police submit that the presumption at section 14(3)(b) applies to the information at issue because the information was compiled and is identifiable as part of an investigation into a possible violation of law under the *Criminal Code of Canada*. They submit that the records reflect the actions taken by investigators involved in investigating a complaint for the sole purpose of determining whether a crime was committed and whether charges were warranted. They submit that although no charges were laid, the presumption still applies.

⁹ Orders P-242 and MO-2235.

¹⁰ Orders MO-2213, PO-1849 and PO-2608.

[37] The appellant submits that for section 14(3)(b) to apply, evidence must be provided to demonstrate that the investigation was a valid police investigation and “not a [ruse] or a sting to separate [the appellant and her husband].”

[38] The records at issue consist of a video witness statement; a general occurrence report that contains descriptions of statements taken from identifiable individuals including the affected party and a written synopsis of the video witness statement; and, police officer notes. In my view it is clear that the personal information was compiled by the police in the course of their investigation into a complaint that formed the subject matter of the records and that their investigation could have given rise to charges under the *Criminal Code of Canada*. Accordingly, I find that all of the information at issue falls under the presumption at section 14(3)(b) of the *Act*. As a result, I accept that its disclosure constitutes a presumed unjustified invasion of the personal privacy of the individuals, other than the appellant, to whom it relates, and that this must be considered when balancing the parties’ interests with respect to the disclosure of the information.

Section 14(2) – Factors weighing for or against disclosure

[39] As noted above, section 14(2) identifies factors for the police to consider when making a determination of whether the disclosure of the personal information would result in an unjustified invasion of the affected parties’ personal privacy. In their representations the police suggest that the factors weighing against disclosure at sections 14(2)(f), (h) and (i) are relevant in the circumstances of this appeal. Those sections read:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances including whether,

...

(f) the personal information is highly sensitive;

...

(h) the personal information has been supplied by the individual to whom the information relates in confidence;

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

Section 14(2)(f) – highly sensitive

[40] To be considered “highly sensitive” as contemplated by the factor weighing against disclosure at section 14(2)(f), there must be a reasonable expectation of

significant personal distress if the information is disclosed.¹¹

[41] The police's representations suggest that they are of the view that section 14(2)(f) is a relevant consideration in the circumstances of this appeal. They state that the records contain confidential information regarding allegations of the physical and verbal abuse of the deceased.

[42] The appellant disagrees that the factor at section 14(2)(f) is a relevant consideration, and states that affected party A's "sensitivities or concerns are no grounds for refusing this request for information."

[43] I accept that given the character and quality of the specific information at issue, its disclosure can be considered to be "highly sensitive" within the meaning of section 14(2)(f). In my view, given its nature it is reasonable to conclude that the disclosure of the personal information of the individuals other than the appellant (including affected party A, who has not consented to disclosure, and the deceased, who does not have the opportunity to consent to its disclosure), could reasonably be expected to result in their significant personal distress. Accordingly, I find that factor at section 14(2)(f) weighing against disclosure is relevant.

Section 14(2)(h) – supplied in confidence

[44] This factor applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.¹²

[45] The police submit that the information at issue was collected for the sole purpose of ascertaining whether charges were warranted and it was collected in confidence. They submit that "police investigation reports ... are both confidential and privileged to the investigative body to maintain fairness and presumption of innocence." The police further submit that when individuals provide statements to police investigators "they do not expect that the personal information they provide will subsequently be disclosed in the manner contemplated by this appeal."

[46] The appellant submits that the factor at section 14(2)(h) must be considered on a case-by-case basis and refers to Order MO-2830 in which Adjudicator Colin Bhattacharjee stated:

In my view, whether an individual supplied his or her personal information to the police in confidence during an investigation is contingent on the particular facts, and such a determination is on a case by case basis.

[47] In Order MO-2830, Adjudicator Bhattacharjee went on to find that the factor at section 14(2)(h) was relevant in the appeal before him and stated:

¹¹ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

¹² Order PO-1670.

In the particular circumstances of this appeal, the withheld parts of the occurrence reports include statements that the appellant's sister, brother and mother made to the police. I am satisfied that these individuals and the police expected that some of these individuals' personal information would be treated confidentially. Given the adversarial relationship that appears to exist between the appellant and some of her family members and the nature of the incident that took place, I also find that this expectation of confidentiality was reasonable in the circumstances

[48] The circumstances before me raise similar considerations as those in Order MO-2830. The context and surrounding circumstances of the complaint that gave rise to the records at issue in this appeal, as well as the representations of both the police and the appellant, reveal that there is conflict between the appellant and affected party A. Additionally, I accept that the nature and content of the information at issue is such that a reasonable person would expect that the information that the identifiable individuals supplied to the police in the context of this specific law enforcement matter would be subject to a degree of confidentiality.

[49] Accordingly, I find that the factor in section 14(2)(h) is a relevant consideration that weighs in favour of protecting the privacy of the individuals other than the appellant and of withholding their personal information.

Section 14(2)(i) – unfair damage to reputation

[50] The applicability of this section is not dependent on whether the damage or harm envisioned by the clauses is present or foreseeable, but whether this damage or harm would be "unfair" to the individual involved.¹³

[51] Although the police raised the possible relevance of the factor at section 14(2)(i) in their decision letter, they do not specifically address it in their representations.

[52] The appellant does not comment on whether or not disclosure of the information at issue could result in unfair damage to any individual's reputation, but submits generally that the factor at play in section 14(2)(i) is "being used as a pretext to protect improper actions."

[53] In my view, I have not been provided with sufficient evidence to establish that the factor at section 14(2)(i) is relevant in the current appeal.

Summary of the relevant presumptions and factors

[54] As noted above, for information claimed to be exempt under section 38(b), this office will consider and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would amount to an unjustified invasion of personal

¹³ Order P-256.

privacy.¹⁴ Accordingly, in making a determination of whether section 38(b) applies to the records at issue in this appeal, I must consider the interests of the parties in light of the presumption at section 14(3)(b) and the factors at sections 14(2)(f) and (h) which I have found to be relevant in the circumstances before me.

[55] I have found that the presumption against disclosure at section 14(3)(b) applies to the personal information that remains at issue as it was compiled as part of an investigation into a possible violation of law. Accordingly, the disclosure of the information is presumed to result in an unjustified invasion of the personal privacy of identifiable individuals other than the appellant. I have also found that the factors weighing against disclosure at sections 14(2)(f) and (h) are relevant considerations as the specific information that remains at issue is "highly sensitive" and because the individuals providing the personal information had a reasonably-held expectation of confidence with respect to the disclosure of that information. However, I have been provided with insufficient evidence to support a conclusion that any factors or criteria weighing in favour of the disclosure of the personal information of individuals other than the appellant might apply.

[56] As a result, I find that the disclosure of the information at issue would constitute an unjustified invasion of privacy of the individuals to whom it relates, including affected party A and the deceased. This finding is, however, subject to the possible application of the exception at section 14(4)(c) which states that if disclosure is desirable for compassionate reasons it does not constitute an unjustified invasion of personal privacy.

Section 14(4) – disclosure not an unjustified invasion of personal privacy

[57] As mentioned above, a finding that disclosure amounts to an unjustified invasion of personal privacy can be overcome by one of the exceptions set out in section 14(4). That section lists types of disclosure that are deemed not to constitute an unjustified invasion of personal privacy. In the circumstances of this appeal, the only paragraph in section 14(4) that might be relevant is found at section 14(4)(c).

Section 14(4)(c) – compassionate grounds

[58] Section 14(4)(c) permits the disclosure of personal information about a deceased individual to the spouse or close relative of the individual where it is desirable to do so for compassionate reasons. Based on the wording of this provision, a finding that section 14(4)(c) applies to some or all of the personal information means that disclosure would *not* be an unjustified invasion of personal privacy. Section 14(4)(c) reads:

... a disclosure does not constitute an unjustified invasion of personal privacy if it,

¹⁴ Order MO-2954.

discloses the personal information about a deceased individual to the spouse or a close relative of the deceased individual, and the head is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons.

[59] Personal information about a deceased individual can include information that also qualifies as that of another individual. Where this is the case, the “circumstances” to be considered would include the fact that the personal information of the deceased is also the personal information of another individual or individuals. Additionally, the factors and circumstances referred to in section 14(2) may provide assistance in this regard, but the overall circumstances must be considered and weighed in any application of section 14(4)(c).¹⁵

[60] The application of the exception at section 14(4)(c) requires a consideration of the following questions, all of which must be answered in the affirmative in order for the section to apply:

1. Do the records contain the personal information of a deceased individual?
2. Is the requester a spouse or “close relative” of the deceased individual?
3. Is the disclosure of the personal information of the deceased individual desirable for compassionate reasons, in the circumstances of the request?¹⁶

[61] Considering the first two questions, I have found that the records at issue contain the personal information of a deceased individual and it is clear that the appellant is the deceased’s spouse. Accordingly, the first two requirements for the application of section 14(4)(c) have been met.

[62] Turning to the third requirement, for disclosure *not* to be an unjustified invasion of privacy under section 14(4)(c), I must consider whether, in the circumstances, the disclosure of the personal information of the deceased is desirable for compassionate reasons.¹⁷ Compassionate reasons have generally been described as information that will assist a close relative in understanding the events leading up to and surrounding the death of an individual.¹⁸

[63] The police submit that it considered whether the exception at section 14(4)(c) applied and found that it did not because the report was completed not because of the death of the deceased but in regards to personal information about him that was collected prior to his death. As a result, the police submit that they concluded that disclosure of this information cannot be said to be of any assistance to the appellant in coming to terms with his death.

¹⁵ Order MO-2237.

¹⁶ Orders MO-2237 and MO-2245.

¹⁷ Order MO-2245.

¹⁸ Order MO-2245.

[64] The appellant takes the position that all of the information at issue should be disclosed for compassionate reasons. The appellant's representations state that the circumstances surrounding the complaint that forms the subject matter of the records at issue "was more than a sad event" for her and "is a point in time (and the events surrounding it) that [she] continuously reflects back on as she continues to grieve the loss of her husband...." The appellant's representations state that she was a "devoted wife and care giver" and also that it should be recognized in "aftermath of the 'incident,'" despite her husband's will and power of attorney being changed, his relationship with the appellant remained "extremely close."

[65] The appellant's representations also take the position that even though the incident does not relate to the death of the appellant's husband, the exception for compassionate grounds at section 14(4)(c) should still apply. In support of her position she refers to Order MO-3126, in which I stated:

After the death of an individual, it is that person's spouse or close relative who is able to act in the "best interest" with regard to **whether or not particular kinds of information would assist them in the grieving process**. The task of the institution is to determine, whether, in the circumstances, disclosure is desirable for compassionate reasons."
[emphasis added]

[66] Having considered the circumstances of the incident to which the records relate and the nature of the information that is at issue, I do not accept that the exception at section 14(4)(c) that permits disclosure for compassionate reasons is applicable in the circumstances of this appeal. While I agree generally with the principle set out in Order MO-3126 that it is a deceased individual's spouse or close relative who is best able to determine what types of information might assist them in the grieving process, I find that in the specific circumstances of this case, disclosure of the information is not desirable for compassionate reasons.

[67] First, while I acknowledge that in some circumstances the fact that the records do not relate to the death of the individual might not be a complete barrier to the application of section 14(4)(c), in my view such circumstances are not present here. As noted above, prior orders have generally found that for disclosure to be considered for "compassionate reasons," the information should be of the type that would assist a close relative in understanding the events leading up to and surrounding the death of an individual. I have no evidence before me to support deviating from such findings.

[68] In Order MO-2237, Commissioner Brian Beamish characterized the legislative intent of section 14(4)(c) as being "assisting relatives in coming to terms with the death of a loved one" and explained:

This approach is borne out by the legislative history of section 14(4)(c).... Prior to the enactment of this provision, denial of access to information to family members regarding the circumstances of their loved ones' death was often forced upon institutions by the operation of section 14(3).

Examples of the kind of information previously withheld include records such as those at issue here and include police occurrence reports, ambulance call reports and 911 call reports [see Orders PO-2473, PO-1757]. This information was previously determined to be exempt from disclosure as an unjustified invasion of the privacy of the deceased because the presumptions of unjustified invasion in section 14(3)(a)(relates to medical history) and/or 14(3)(b) (compiled and identifiable as part of an investigation into a possible violation of law) applied to much of the personal information in these types of records.

[69] I agree with Commissioner Beamish's characterization of the legislative intent of section 14(4)(c) and adopt it for the purposes of this appeal.

[70] The records before me relate to an incident that appears to have occurred well over a year prior to the deceased's death and is unrelated to it. In my view, I have not been provided with sufficient evidence to demonstrate how the disclosure of information of this nature could assist the appellant in "coming to terms" with the death of her husband in a manner that would meet the legislative intent of the exception as described in Order MO-2237. As a result, I conclude that disclosure for compassionate reasons has not been established and section 14(4)(c) does not apply.

Absurd result

[71] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under section 38(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption.¹⁹

[72] The absurd result principle has been applied where, for example:

1. the requester sought access to her own witness statement,²⁰
2. the requester was present when the information was provided to the institution,²¹ or
3. the information is clearly within the requester's knowledge.²²

[73] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.²³

[74] The appellant takes the position that the absurd result principle applies in the

¹⁹ Orders M-444 and MO-1323.

²⁰ Orders M-444 and M-451.

²¹ Orders M-444 and P-1414.

²² Order MO-1196, PO-1679 and MO-1755.

²³ Orders M-757, MO-1323 and MO-1378.

circumstances of this appeal as the information contained in the records is clearly within her knowledge and some of it is her own personal information.

[75] I accept that some of the information contained in the records may very well be within the appellant's knowledge as it contains information that can be described as her own personal information as well as medical information relating to her husband for whom she was primary caregiver for some time prior to his death. However, I do not accept that the absurd result principle applies in the circumstances of this appeal.

[76] None of the information contained in the records amounts to information that the appellant provided directly to the police. Additionally, she was not present when the information was provided to police by other identifiable individuals. In my view, it is not evident which portions of the information contained in the records might be in the appellant's knowledge and which are not. All of the information that can be described as the appellant's own personal information is inextricably intertwined with that of other identifiable individuals and cannot be meaningfully severed. I am satisfied that in the circumstances of this appeal, withholding the information would not be absurd or inconsistent with the purpose of the exemption at section 38(b). For this reason, I find that the absurd result principle does not apply.

Summary conclusion

[77] Having considered the factors, presumptions and exceptions set out in sections 14(2), (3) and (4), as well as the absurd result principle, I conclude that the disclosure of the information that remains at issue would amount to an unjustified invasion of the personal privacy of identifiable individuals other than the appellant. Subject to my review of the police's exercise of discretion below, I find that the remaining information is properly exempt under section 38(b) of the *Act*.

C. Did the police exercise their discretion under section 38(b)? If so, should this office uphold their exercise of discretion?

[78] The exemption at section 38(b) is discretionary. It permits an institution to disclose information despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[79] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[80] In any of these cases this office may send the matter back to the institution for

an exercise of discretion based on proper considerations.²⁴ This office may not, however, substitute its own discretion for that of the institution.²⁵

Representations

[81] The police submit that they exercised their discretion not to disclose the information because disclosure would constitute an unjustified invasion of the personal privacy of the deceased, affected party A, and other identifiable individuals. They submit that the personal information is "highly sensitive due to the circumstances in which it was collected for the police investigation" and that it was gathered from various sources to compile the investigative file.

[82] The police further submit that affected party A specifically states that she does not consent to the disclosure of her personal information. More generally, they submit that if this type of personal information were routinely disclosed, members of the public would be less forthright in cooperating with the police and in assisting with investigations should they become aware that their personal information may be disclosed. The police submit that this outcome should be avoided in the interests of public safety and security.

[83] The appellant responds that the police's exercise of discretion to deny access to the information at issue is the "protection of their own, using the cloak of privacy interests that engenders a mistrust for the kind of abuse of power that happened [in the circumstances of the investigation at issue]." The appellant also takes the position that the police must disclose what they relied upon to commence this investigation.

Analysis and finding

[84] I am satisfied that in exercising their discretion not to disclose the information at issue, the police did so in good faith and for a proper purpose taking into account all relevant factors.

[85] The great majority of the information contained in the video statement, the occurrence report and the police notes amounts to the personal information of individuals other than the appellant. Although the appellant was the subject of the complaint that gave rise to these records, she was not interviewed by the police and the complaint was ultimately discontinued. The personal information belonging to the appellant that remains at issue is inextricably intertwined with that of other identifiable individuals and I have upheld the police's claim that it cannot be disclosed without giving rise to an unjustified invasion of the other individuals' personal privacy under section 38(b).

[86] Additionally, in my view, there is no useful purpose in requiring the police to sever the records to disclose the brief portions of information which consist of

²⁴ Order MO-1573

²⁵ Section 43(2).

information that would amount to "disconnected snippets." Both previous orders of this office and the Divisional Court have found that institutions are not required to sever records if doing so would reveal only this type of information.²⁶

[87] I accept that the police did not err in exercising their discretion to deny the appellant access to the information that I have found subject to the discretionary personal privacy exemption in section 38(b). Accordingly, I find that the police considered all relevant factors and exercised their discretion under section 38(b) of the *Act* appropriately

ORDER:

1. I order the police to disclose the personal information of the individual who provided their consent to disclosure on appeal. For the sake of clarity, I have enclosed a copy of the portion of the record that should be disclosed, highlighted in green.
2. In order to verify compliance with this order I reserve the right to require the police to provide me with a copy of the record disclosed to the appellant.

Original Signed by: _____
Catherine Corban
Adjudicator

_____ April 26, 2016

²⁶ Orders PO-2033-I, PO-1663, PO-1735, MO-2139, PO-2612 and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).